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FILED
SEP 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-138

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

JAMES ODOM *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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September 18, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF OF PETITIONER

Petitioner has demonstrated that this case presents two significant questions concerning the proper interpretation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), each of which merits this Court's review: (1) whether an association-in-fact RICO enterprise must be an organization that has an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity; and (2) whether a group of corporations can constitute an association-in-fact RICO enterprise. As to the first question, Respondents' Opposition only underscores the need for this Court to address and clarify the scope of the statutory "enterprise" requirement. As to the second, Respondents mistakenly claim that this Court previously decided not to disturb the widely-adopted view that association-in-fact enterprises can include corporations. Respondents' arguments are meritless, and this Court should grant certiorari.

1. The Ninth Circuit's decision in this case exacerbates a significant four-to-seven split in the courts of appeals over whether an association-in-fact RICO enterprise must have an ascertainable structure separate from that inherent in the alleged pattern of racketeering activity. The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits hold that it must; the First, Second, Eleventh, and now Ninth Circuits disagree. Respondents do not deny that this split exists.[1] Instead, they urge the Court to allow this conflict to persist, observing that "the circuit split has already existed in one form or another for over twenty years," and speculating that

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[1] Respondents disagree with Petitioner's view of the D.C., Sixth, and Seventh Circuits' positions on this issue. Opp. 3-4. But this only highlights the lack of clarity regarding the requirements of an association-in-fact enterprise and further underscores the need for this Court's intervention.

"it seems to have posed no undue problem for courts, litigants, or the development of the law." Opp. 4.

Respondents are flatly wrong. In the 26 years since this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981), the courts of appeals have struggled with the concept of an association-in-fact RICO enterprise. Yet they have failed to develop a consistent and meaningful definition of that fundamental statutory element. As the Ninth Circuit recognized, the result has been considerable uncertainty and confusion among the lower courts. Pet. App. 14a ("The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts, including our own."). The conflict is mature and irreconcilable and merits this Court's attention.

Moreover, the broad interpretation of the "enterprise" element adopted by the Ninth Circuit below and espoused by the First, Second, and Eleventh Circuits has a profound effect on the scope of civil RICO liability. Section 1962(c)'s requirement that a defendant participate in the operation or management of an "enterprise" is a "critical limitation" on RICO that prevents it from becoming nothing more than a conspiracy or aiding and abetting statute. *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993). Yet these circuits hold that where an association-in-fact enterprise is alleged, no organization is required beyond that inherent in the commission of the alleged predicate acts. By permitting plaintiffs to plead an association-in-fact enterprise in any case in which there is coordinated activity among businesses, this ruling vastly expands RICO's reach far beyond its purpose.

As the U.S. Chamber of Commerce as *amicus curiae* observes, this unwarranted increase in potential corporate RICO liability, with its attendant stigma of "racketeering" and threat of treble damages will continue to have a significant and unintended impact on American businesses unless this Court grants certiorari and restores civil RICO to its proper role. Br. 10 ("[M]any of the *amicus* Chamber of Commerce's

members already face a constant threat of civil RICO suits. And the mere prospect of an increase of costly and potentially ruinous RICO treble-damages litigation predicated solely on collaborations like the marketing agreement at issue here will inappropriately affect corporate decisionmaking.").

Respondents' suggestion that this case does not present an appropriate opportunity to resolve this circuit split, see Opp. 6-11, is baseless. Respondents do not, and cannot, dispute that the Ninth Circuit's decision squarely presents the issue of whether an association-in-fact RICO enterprise must have an ascertainable organizational existence separate and distinct from that inherent in the alleged pattern of racketeering activity. Instead, they argue that the outcome of this case will not be affected by this Court's decision because, Respondents contend, either the Ninth Circuit's decision was correct or Respondents could further amend their complaint to plead the required separate organizational structure. *Id.*

That is no basis to deny this petition. This petition affords the Court an opportunity to settle a clear and irreconcilable conflict among the federal circuits and provide the lower courts much needed guidance as to the proper interpretation of Section 1962(c)'s "enterprise" requirement. What Respondents ignore is the ability of most plaintiffs suing large corporations to forum shop and bring their RICO actions in circuits where there is no requirement that an organization be ascertainable. That situation is intolerable, and only this Court can bring uniformity to the law.

In any event, the Ninth Circuit's holding was not, as Respondents suggest, "based on a straightforward application of *Turkette*." *Id.* at 9. That court's erroneous interpretation of the "enterprise" requirement finds no support in *Turkette* or the language and structure of the statute. Indeed, by effectively collapsing two separate elements – enterprise and pattern – into one, it rewrites the statute and alters the

statutory scheme. See *United States* v. *Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991).[2]

Properly construed, the enterprise requirement is not, and cannot be, met in this case. The enterprise alleged by Respondents consists only of the marketing agreement between Microsoft and Best Buy and their actions in furtherance of that agreement. The district court correctly held that these allegations fail to demonstrate the existence of an enterprise separate and distinct from the alleged racketeering activity. Pet. App. 34a. The district court also properly concluded that any additional allegations (such as those Respondents propose to include if they are permitted to further amend their complaint (Opp. 8)) concerning the personnel involved and the procedures under which they implemented the marketing agreement will not cure this deficiency. Pet. App. 35a. No additional allegations can change the fact that the alleged enterprise in this case is simply (and indisputably) a marketing alliance between two independent companies to promote certain of each other's products and services. This petition squarely presents the issue of whether this contractual alliance can be a RICO enterprise and asks the Court to clarify that an enterprise must be something more than, and distinct from, the persons who comprise it and the acts they allegedly commit.

In short, the Ninth Circuit's conclusion that Respondents properly alleged a RICO enterprise undeniably presents the question of whether an association-in-fact enterprise must be an organization with a separate ascertainable structure. Without correction, the court of appeals' ruling will allow plaintiffs to transform state-law consumer protection claims

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[2] Respondents assert that a simple conspiracy would not be enough to constitute an enterprise as defined by the Ninth Circuit. Opp. 10 n.5. However, it would be a rare conspiracy, if any, that would not meet the Ninth Circuit's requirements of a group of associates acting with a common purpose and using their association as a vehicle to commit an ongoing series of predicate acts.

into federal RICO actions and to wield the threat of draconian penalties to extract unwarranted settlements.[3] The coercive force of RICO's harsh sanctions should not depend on the court in which the lawsuit is filed. It is time for this Court to resolve this conflict by granting the petition for certiorari.

2. The Ninth Circuit's decision also presents the issue of whether a group of corporations can constitute an association-in-fact RICO enterprise. This question is one of fundamental importance because it frames the first question presented and has the potential to expose virtually every business entity to RICO's treble damages for every collaborative activity with another business.

No obstacles prevent the Court's review of this significant question. Respondents nonetheless assert that the Court's consideration of this issue in *Mohawk Industries, Inc.* v. *Williams*, 126 S. Ct. 2016 (2006), and its choice not to resolve it in that case "reflect[s] an inclination to leave undisturbed the unanimous conclusion of the ten circuits that have considered the matter." Opp. 13. This Court, of course, best understands the basis for its decision, but it is at least equally plausible that the Court declined to resolve this issue in *Mohawk* because it was not raised explicitly in the petition for certiorari.

Respondents also suggest that the weight of contrary authority counsels against granting this petition. In fact, the opposite is true. As demonstrated in the petition, the courts of appeals' reasoning on this issue – to the extent it exists – is unpersuasive and does not withstand scrutiny. Some, like Respondents here (*id.*), rely on the fact that the definition of

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[3] Respondents' Opposition is telling. Although their RICO claim is fundamentally and incurably flawed, Respondents assert that they should be permitted to amend their complaint yet again based on information they claim to have obtained in discovery on their state-law claims in their related case pending in state court, undoubtedly in the hope that a settlement can be extracted. Opp. 8.

"enterprise" is introduced by the term "includes" without conducting any analysis of whether Congress intended that term to provide an illustrative list of examples or whether Congress used that term, as it has elsewhere in the statute, to introduce a comprehensive list. See, *e.g.*, *Masters*, 924 F.2d at 1366; *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1982).[4] Others make unfounded policy arguments that Congress ought to have provided for associations in fact consisting of corporations. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988) (per curiam) (suggesting that construing the statute as written would "lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO").[5] Others provide no rationale at all. See, *e.g.*, *United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985).

Nonetheless, simply because this flawed view has been widely accepted by the lower courts, the issue is seldom

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[4] Respondents' observation that a corporation is a "person" as defined in Section 1961(3) and therefore may be liable if it is "associated with any enterprise" and "conduct[s] or participates[s] ... in the conduct of such enterprise's affairs through a pattern of racketeering activity," 18 U.S.C. § 1962(c), is irrelevant. Opp. 13-14. That the statute contemplates the possibility that corporations may be part of certain types of enterprises (such as partnerships or associations) does not necessarily mean that Congress intended association-in-fact enterprises to include corporations. Congress *could* have defined an enterprise as including a group of *persons* associated in fact, but it did not. Instead, it defined enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added).

[5] Contrary to Respondents' characterization, excluding corporations from association-in-fact enterprises is not a "truly radical limitation of RICO." Opp. 14. Nor would it lead to the "bizarre result" feared by the D.C. Circuit. Criminals could not avoid RICO simply by forming corporations. In such a situation, the individuals could be charged and each corporation also could be charged as a separate enterprise.

raised and numerous cases are permitted to proceed based on a theory that lacks support in the statute. This case presents an opportunity to correct this fundamental misinterpretation of RICO's enterprise requirement and restore it to the scope Congress intended. The Court unquestionably should decide the first question presented, and the second one provides a complementary issue that will allow the Court fully to address the scope of civil liability under RICO.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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